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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-790

CLIFTON DEAN PERKINS,

Petitioner,

vs.

MELVIN R. LAIRD, Secretary of Defense,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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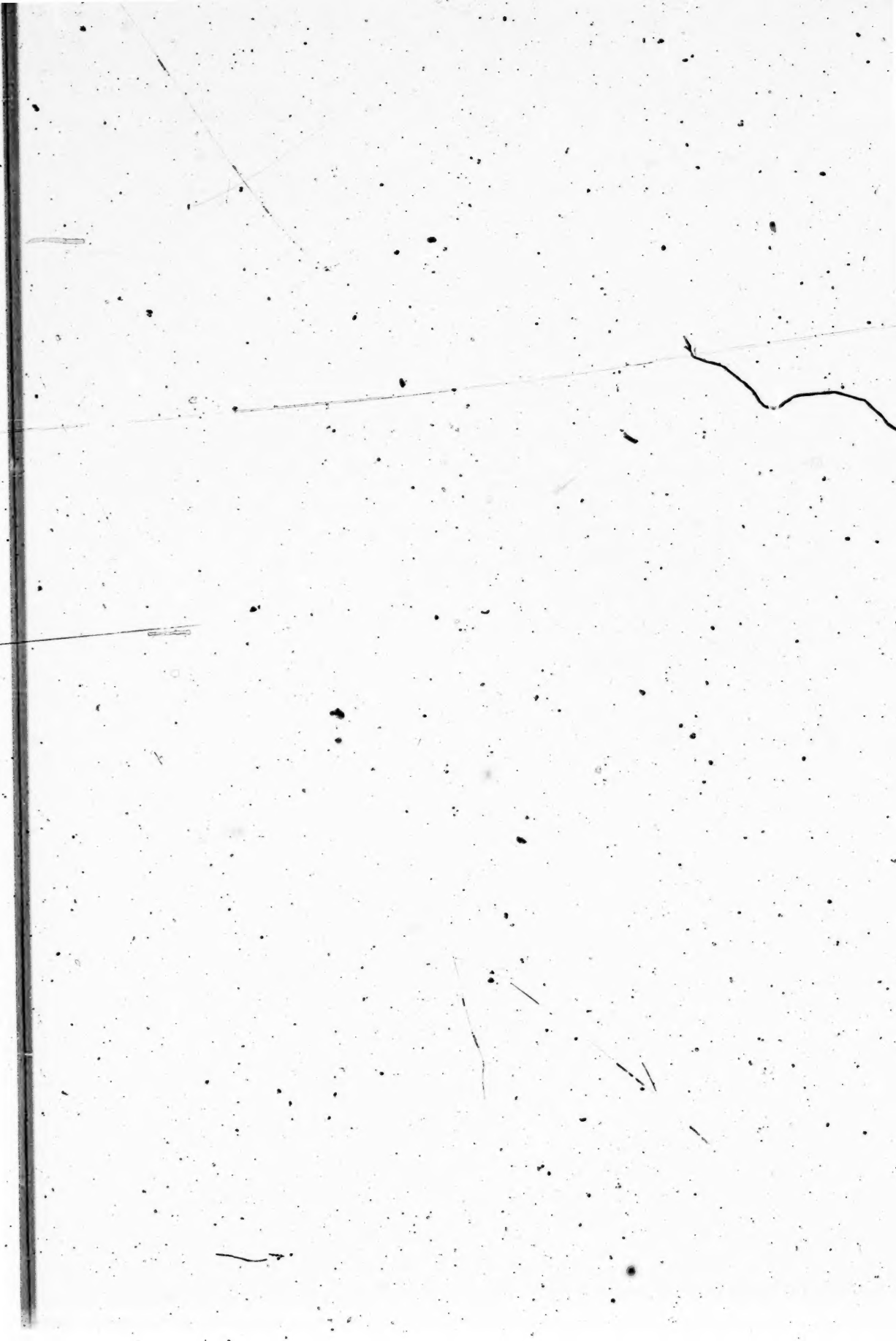

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
I. The decision below decides an important question of federal law concerning jurisdiction over claims of denial of liberty which has not been, but should be, settled by this Court	4
II. The decision of the court below is in conflict with the other federal courts on the same issue	6
Conclusion	9
Appendix:	
Eighth Circuit Court of Appeals Opinion	A-1
District Court Memorandum Order Granting Motion to Dismiss	A-2
Complaint	A-4
Plaintiff's Interrogatories to Defendant	A-13
Motion to Dismiss	A-16

TABLE OF AUTHORITIES

Cases: PAGE

Berk v. Laird, 429 F. 2d 302 (2d Cir. 1970), *cert. denied*, 92 S. Ct. 94 (1971) 4, 5, 7, 8

Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970) 7

Flast v. Cohen, 392 U.S. 83 (1968) 5

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 6

Greene v. McElroy, 360 U.S. 474 (1959) 6, 7

Holmes v. United States, 391 U.S. 936 (1968) 5

Kent v. Dulles, 357 U.S. 116 (1958) 6

Luftig v. McNamara, 373 F. 2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967) 4, 5, 6

Massachusetts v. Laird, No. 71-1177 (1st Cir., Oct. 21, 1971) 4, 5

Massachusetts v. Laird, 400 U.S. 886 (1970) 4, 5

Massachusetts v. Laird, 327 F. Supp. 378 (D. Mass. 1971) 8

Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970) 4, 5, 7

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 5

Orlando v. Laird, 317 F. Supp. 1013 (E.D. N.Y. 1970), aff'd 443 F. 2d 1039 (2d Cir.), *cert. denied*, 92 S. Ct. 94 (1971) 4, 5, 7, 8

Pryor v. United States, 92 S. Ct. 23 (1971) 4

PAGE

Switkes v. Laird, 316 F. Supp. 358 (S.D. N.Y. 1970) 7

Thompson v. United States, *cert. denied*, 92 S. Ct. 239 (1971) 5

United States v. W. T. Grant Co., 345 U.S. 629 (1953) 5

Velvel v. Nixon, 415 F. 2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) 4, 7

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 6

United States Constitutional Provisions:

Article I, Section 8 ..... 2, 7

Amendment V 2

Statutes:

28 U.S.C. § 1254(1) 2

50 U.S.C. App. 451-456, 458-471 3

Minn. Laws 1971, c. 120 3

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Clifton Dean Perkins respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 17, 1971.

OPINION BELOW

The opinions of the Court of Appeals and of the District Court are not yet reported. They appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1971, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May the Government, in the absence of a declaration of war, compel involuntary military service in armed international conflict?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Article I, Section 8, provides in part:

> The Congress shall have the power:
>
> . . . To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; . . .

Amendment V provides in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Petitioner Clifton Dean Perkins, a resident of the State of Minnesota, was conscripted into and is now serving in the United States Army pursuant to the Military Selective Service Act of 1967, 50 U.S.C. App. §§ 451-456, 458-471. On April 1, 1971, petitioner was ordered to report for combat duty in Vietnam.

On May 24, 1971, petitioner, represented by Minnesota Attorney General Warren Spannaus pursuant to the provisions of Minn. Laws 1971, c. 120, commenced this action in United States District Court for the District of Minnesota. The action was filed pursuant to 28 U.S.C. § 1331(a) as a civil action wherein the sum in controversy exceeds $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States. Petitioner sought an injunction and a declaratory judgment that the order sending him to Vietnam deprived him of his liberty without due process of law. The suit is founded on the simple proposition that no citizen may be compelled to participate involuntarily in international combat absent a declaration of war.

Upon motion of respondent, the District Court dismissed petitioner's complaint on August 25, 1971. On September 17, 1971, the same day on which oral argument was heard, the Court of Appeals affirmed the judgment of the District Court in a one-sentence opinion.

During the course of this litigation, petitioner's transshipment to Vietnam was enjoined by orders of the District Court. Upon the issuance of the mandate of the Court of Appeals, the last of these injunctions was dissolved. Petitioner reported to the Oakland Army Base, Oakland, California, and was reassigned to Ft. Snelling, Minnesota, where he is currently serving.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Decides an Important Question of Federal Law Concerning Jurisdiction Over Claims of Denial of Liberty Which Has Not Been, But Should Be, Settled by This Court

No function of this Court is more critical than its fundamental duty to protect an individual's freedom from unwarranted incursions by the Government. Nowhere is the exercise of this duty more necessary than in the instant case, where the Government has deprived petitioner of his liberty by conscripting him into the Army and compelling him to risk death or grave injury by ordering him to fight in the Vietnam war. The Government will argue that Congress has implicitly condoned the commitment of armed forces to Vietnam and that this implicit ratification satisfies the Constitution. Petitioner contends that explicit Congressional approval of the Vietnam war is required before the Executive can compel him to forego his personal freedom. Such a conflict can only be—indeed, must be—resolved by this Court.

The instant case, unlike other "antiwar" cases,[1] presents the issue in the posture deemed by Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart to warrant granting certiorari. See opinion of Mr. Justice Douglas in *Pryor v. United States*, 92 S. Ct. 23 (1971); opinion of Mr. Justice

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[1] A number of such cases have been filed in recent years. See, *e.g.*, Luftig v. McNamara, 373 F. 2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Velvel v. Nixon, 415 F. 2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970); Massachusetts v. Laird, 400 U.S. 886 (1970); Orlando v. Laird, 443 F. 2d 1039 (2d Cir.), *cert denied*, 92 S. Ct. 94 (1971); Berk v. Laird, 429 F. 302 (2d Cir. 1970), *cert. denied*, 92 S. Ct. 94 (1971).

Stewart in *Holmes v. United States*, 391 U.S. 936 (1968); opinion of Mr. Justice Brennan in *Thompson v. United States, cert. denied*, 92 S. Ct. 239 (1971).[2] Other cases rejected for consideration by this Court have not involved such "concrete adverseness"[3] between an unwilling citizen and the coercive Government. In *Orlando v. Laird*, 443 F. 2d 1039 (2d Cir.), *cert. denied*, 92 S. Ct. 94 (1971), petitioners were enlistees who had entered the Army voluntarily and with full knowledge that they might be ordered into combat. In *Massachusetts v. Laird*, 400 U.S. 886 (1971), this Court declined to exercise its original jurisdiction to permit the State of Massachusetts to sue in its sovereign capacity and as parens patriae.[4] Only in *Luftig v. McNamara*, 373 F. 2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967), was petitioner a conscriptee under orders to report for combat duty; however, recent decisions[5] have discarded the rationale of *Luftig*, indicating that the issues brusquely rejected there now require consideration by this Court.

The issue of governmental power versus individual liberty presented by this case transcends the mere question of whether Clifton Perkins must fight in Vietnam; the overriding question presented to this Court is whether the Executive may

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[2] Any contention that this case has been rendered moot by the cancellation of petitioner's orders to Vietnam is belied by the fact that he may still receive such orders. In any event, it is settled that defendant cannot render a case moot merely by ceasing the allegedly illegal conduct. See United States v. W. T. Grant Co., 345 U.S. 629 (1953).

[3] Flast v. Cohen, 392 U.S. 83, 101 (1968).

[4] See Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

[5] See, *e.g.*, Berk v. Laird, 429 F. 2d 302 (2d Cir. 1970), *cert. denied*, 92 S. Ct. 94 (1971); Orlando v. Laird, 317 F. Supp. 1013 (E.D. N.Y. 1970), *aff'd* 443 F. 2d 1039 (2d Cir.), *cert. denied*, 92 S. Ct. 94 (1971); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970); Massachusetts v. Laird, 327 F. Supp. 378 (D. Mass. 1971), *aff'd* No. 71-1177 (1st Cir. 1971).

commit the nation to war without Congressional sanction and then compel citizens to fight in such a war. As such, this case involves a threat to personal freedom more pervasive and real than other such "threats" reviewed by this Court. See, *e.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (publicly posting the name of a habitual drunkard); *Kent v. Dulles*, 357 U.S. 116 (1958) (restrictions on the right to travel abroad); *Greene v. McElroy*, 360 U.S. 474 (1959) (loss of employment as a result of an unauthorized security program); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (taxation of costs against acquitted criminal defendants). The liberty of the thousands of citizens subject to compulsory military service is at stake here, and only a decision by this Court can resolve this critical constitutional question.

II

The Decision of the Court Below Is in Conflict With Other Federal Courts on the Same Issue

The essence of petitioner's claim is that the executive branch of government has deprived him of his liberty without the constitutionally required sanction of the legislative branch. Similar claims have been presented to other federal courts, but these courts have differed sharply over the form and measure of Congressional action required by the Constitution before the Executive may exercise its power to wage war and transmute free citizens into regimented soldiers. Because of the grave consequences which follow a decision to commit the nation to war, the conflict among the lower courts requires a decision by this Court.

A few federal courts, including, apparently, the lower court in the case at bar, have deemed the question unworthy of judicial scrutiny. *Luftig v. McNamara*, 373 F. 2d 664 (D.C. Cir.),

cert. denied, 387 U.S. 945 (1967); *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970); *Switkes v. Laird*, 316 F. Supp. 358 (S.D. N.Y. 1970); *Velvel v. Nixon*, 415 F. 2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). Recent decisions, however, have rejected objections to standing and justiciability and have attempted to reconcile the language of the Constitution with the facts of this Nation's involvement in Vietnam.[6] Unfortunately, these attempts have produced only inconsistent and unsupportable interpretations of Article I, Section 8.

Two other Courts of Appeals have considered the issue in a different way. Neither decision resolves the question. In *Orlando v. Laird*, 443 F. 2d 1039 (2d Cir.), *cert. denied*, 92 S. Ct. 94 (1971), the Second Circuit concluded that certain acts of Congress implicitly ratified the war and thereby satisfied the constitutional requirement of joint action by Congress and the Executive. 443 F. 2d at 1042. The court based its decision on passage of the Gulf of Tonkin resolution and military appropriations bills without considering that the former had been repealed and that the latter do not, as a matter of law, signify Congressional approval of Executive action. *Greene v. McElroy*, 360 U.S. 474 (1959). Moreover, the court's conclusion that the Constitution permits joint Congressional-Executive action in committing the nation to war ignores the specific provision of Article I, Section 8, that only Congress—the Executive is not mentioned—shall have the power "to declare war."

The decision of the First Circuit is no more conclusive. Instead of concluding that Congress had implicitly ratified the war, the court decided that the Constitution requires only passive Congressional acquiescence. *Massachusetts v. Laird*, No.

[6] Berk v. Laird, 429 F. 2d 302 (2d Cir. 1970), *cert. denied*, 92 S. Ct. 94 (1971); Orlando v. Laird, 443 F. 2d 1039 (2d Cir.), *cert. denied*, 92 S. Ct. 94 (1971); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).

71-1177 (1st Cir., Oct. 21, 1971). The court determined that because the legislative and executive branches were not in opposition, there was no necessity for determining the respective boundaries of the war powers of each branch. However, the Constitution protects individual rights, not the powers of the three branches. The court's abstract rationalization typifies the failure of the lower courts to resolve the fundamental question presented here: may the Executive impose the burdens of war on the citizen without the constitutionally required approval of the citizen's elected representatives?

The conflict among the Circuit Courts has caused the lower court here to render an opinion that is squarely at odds with the single case upon which it relied. The district court herein held that the question presented was a "political question" and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted. The Circuit Court affirmed, citing only *Orlando v. Laird*, 443 F. 2d 1039 (2d Cir.), *cert. denied*, 92 S. Ct. 94 (1971). However, in the *Orlando* case, and in its related case, *Berk v. Laird*, 429 F. 2d 302 (2d Cir. 1970), the Second Circuit specifically held that the controversy *was not* a "political question," that plaintiffs had standing, and that the complaint presented a claim upon which relief may be granted, 443 F. 2d at 1040. The Circuit Court in the instant case erred by inexplicably relying on *Orlando* to reach a conclusion diametrically opposite to the holding of *Orlando*.

Thus, if this Court refuses to grant the writ of certiorari sought herein, petitioner will have been wrongfully denied the opportunity to adduce answers to his interrogatories and present evidence to the district court in support of his claim of denial of liberty. As Mr. Justice Douglas wrote in *Massachusetts v. Laird*, 400 U.S. 886, 91 S. Ct. 128 at 133-34 (1971):

> "We have never ruled, I believe, that when the Federal Government takes a person by the neck, and sub-

> mits him to punishment, imprisonment, taxation, or submission to some ordeal, the complaining person may not be heard in court. The rationale in cases such as the present is that government cannot take life, liberty, or property of the individual and escape adjudication by the courts of the legality of its actions."

The decision below has denied petitioner his day in court in an opinion that is contrary to the rule of the Second Circuit, a rule itself contrary to the rule of the District of Columbia Circuit. This direct conflict among the Circuit Courts requires resolution of these critical issues by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Eighth Circuit to review the decision of that Court entered on September 17, 1971.

Respectfully submitted,

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APPENDIX

EIGHTH CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1491
No. 71-1380

CLIFTON DEAN PERKINS,

Appellant,

vs.

MELVIN R. LAIRD, Secretary of Defense,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

Before VAN OOSTERHOUT, HEANEY and ROSS, Circuit Judges.

ORDER

The decision of the District Court dismissing the plaintiff's complaint is affirmed for the reasons set forth in *Orlando v. Laird*, 443 F. 2d 1039 (2nd Cir. 1971).

September 17, 1971

MEMORANDUM ORDER GRANTING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CLIFTON DEAN PERKINS,

Plaintiff,

vs.

MELVIN R. LAIRD, Secretary of Defense,

Defendant.

MEMORANDUM ORDER
No. 4-71-Civil 261

This Court on June 25, 1971, denied a request by plaintiff for a preliminary injunction primarily on the ground that plaintiff is not likely to prevail on the merits and has not shown a strong probability of success.

Plaintiff has since appealed the denial of the motion for a preliminary injunction to the Court of Appeals for this Circuit which will hear argument in September. Plaintiff's order to report for service in Vietnam has been stayed by this Court until the decision of the Court of Appeals.

In the meantime plaintiff has moved for the production of documents, specifically the so-called "Pentagon Papers," and defendant has moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Minnesota Lawyers Committee on the Constitutionality of the War in Southeast Asia has moved for leave to appear as amicus curiae. That motion was granted and that Committee has supplied the Court with an excellent and exhaustive brief.

The Court has considered the arguments and briefs of counsel and amicus curiae.

The June 25, 1971, Memorandum referred to several Trial Court and Court of Appeals decisions which have considered the matter. By far the greater number of those courts granted motions to dismiss and thus denied relief to the plaintiffs. This Court believes itself compelled to accept the decisions of superior appellate courts and fellow trial judges. The Supreme Court had the opportunity in the *Massachusetts* case to review the matter, but declined to do so. Undoubtedly some of the cases decided last year and earlier this year (including this case) will again reach the Supreme Court.

The June 25 Memorandum stated that plaintiff's claim lacked a strong probability of success for the reason that the constitutional question as to declaration or non-declaration of war was a political question, was not justiciable, or was a policy question for the Congress. The conviction, rightly or wrongly, appears to be that the courts are not in position to oversee foreign policy or position the armed forces.

Plaintiff suggests that there should be a trial at this time on the question of ratification. Defendant claims that the repealed Tonkin Gulf resolution was a form of ratification. Defendant claims also that the repeated acts of Congress, which was keenly aware of the hostilities in Southeast Asia, in appropriating substantial sums of money for the specific purpose of continuing the conflict indicated a ratification of the Presidential action. Plaintiff's response is that though Congress regularly appropriated money for the continued hostilities in Southeast Asia, that this was not its real intent and, further, that Congress was misled or that it was not supplied with all of the relevant and necessary information.

If the Court of Appeals returns the case of this Court for hearing, or if this Court requires additional trial, the question of ratification may then be inquired into.

IT IS ORDERED:

1. That the motion to dismiss the complaint be granted.
2. That the motion to produce documents—the Pentagon Papers—be denied, with the reservation that this motion may be renewed in the event that later hearing or trial may be required.

EARL R. LARSON
United States District Judge

August 24, 1971.

COMPLAINT

[Caption Omitted]

Clifton Dean Perkins, for his claim for relief herein, states and alleges as follows:

1. This is an action for declaratory and injunctive relief brought under Sections 1331, 1332, and 2201 of Title 28 of the United States Code (28 U.S.C. §§ 1331, 1332, and 2201) as a civil action arising under the Constitution, laws and treaties of the United States. The amount in controversy exclusive of costs, exceeds Ten Thousand and no/100 Dollars ($10,000).

2. Plaintiff Clifton Dean Perkins is a resident of the State of Minnesota and is a member of the United States Army, Serial Number US 473-58-5808.

3. Defendant Melvin R. Laird is the Secretary of Defense and is an officer of the United States government. He is a resident of a state other than the State of Minnesota.

4. On or about April 28, 1970, plaintiff was ordered to report for induction into the United States Army, pursuant to the provisions of the Military Selective Service Act of 1967 (50 U.S.C. App. §§ 451-456, 458-471). Plaintiff did not volunteer for said service, and was conscripted pursuant to the provisions of said law.

5. On or about May 28, 1970, plaintiff was inducted into the United States Army and was assigned to Ft. Bragg, North Carolina, for basic training. Upon completion of basic training, plaintiff was assigned to Ft. Belvoir, Virginia, where he was given advance individual training as an artillery surveyor. Upon completion of advanced individual training, plaintiff was assigned to the 6th Armored Cavalry, "D" Company, and stationed at Ft. Meade, Maryland.

6. On or about April 1, 1971, plaintiff was ordered to report, not later than June 5, 1971, to the United States Army Overseas Replacement Station, Oakland, California, for ultimate assignment to the Transfer Detachment of the United States Army Command for the Republic of Vietnam, (USARV TRANS DET). A copy of said Order is attached as Exhibit A. At no time has plaintiff volunteered to go to Vietnam nor has he volunteered to participate in military or war activity in Vietnam or any other foreign country in Indochina.

7. Upon information and belief:

a. The United States of America is presently engaged in a war known variously as the "Vietnam" or "Indochina" war. The President and the Secretary of Defense have committed substantial numbers of persons to fighting this war. Not all of said persons volunteered to so serve.

b. American involvement in the Indochina war commenced in 1950, when the United States provided military assistance to French forces fighting in Indochina. After the abandonment

of Indochinese operations by French forces in 1954 and after the signing of the Geneva Accords, the United States provided military assistance directly to various Indochinese governments, particularly what is now the so-called Republic of Vietnam, (hereinafter "South Vietnam").

c. Initially such aid was provided by the United States Military Assistance Advisory Group, which helped to train the South Vietnam army. By 1960, the number of such "advisors" had been increased to approximately 700. The number of military "advisors" increased to approximately 11,000 by the end of 1962. This military assistance was furnished pursuant to orders issued by the executive department, and at no time did Congress declare war or in any other manner ratify United States involvement in Indochina hostilities.

d. As the fighting in Vietnam continued and escalated, the United States increased its military aid to South Vietnam. The executive department, through presidential orders, increased the number of military "advisors" in South Vietnam from approximately 16,000 at the end of 1963 to approximately 23,000 at the close of 1964. United States deaths due to enemy action in Vietnam exceeded 200 at the end of 1964.

e. In August 1964, in response to alleged attacks by gunboats of what has been called North Vietnam upon several United States vessels stationed in the Gulf of Tonkin, the President ordered retaliatory air strikes against the North Vietnamese gunboats and against enemy installations in North Vietnam. Congress then passed a resolution authorizing certain executive action to protect United States military forces stationed in Vietnam, known as the "Gulf of Tonkin" resolution. This resolution did not indicate any intent on the part of Congress to declare war or to otherwise ratify prolonged United States participation in armed hostilities in Indochina, and was repealed on December 30, 1970

f. In the Spring of 1965, air strikes against North Vietnam increased from approximately 160 to approximately 1,500; four United States marine battalions, including two combat units, were dispatched to South Vietnam.

g. By the end of 1965, approximately 1,100 United States military personnel had been killed in the war, and more than 14,000 had been wounded. Over 350 United States aircraft were lost during 1965. By the end of 1965, over 184,000 troops were stationed in Vietnam. Congress at no time declared war or otherwise ratified participation in these hostilities.

h. United States involvement in the Indochina war continued to increase, with heavier bombing of North Vietnam, with increases in the commitment of combat troops to over 385,000 by the end of 1966, and with increasing casualties. By the end of 1966, over 6,000 United States military personnel had died as a result of the armed hostilities in Indochina, and more than 37,700 had been wounded.

i. The intensity of United States involvement in Indochina continued to increase throughout 1967, 1968, and 1969. By the close of 1968, more than 25,000 United States soldiers had been killed and more than 190,000 had been wounded. Approximately 536,000 troops were stationed in Vietnam by the end of 1968.

j. In 1969, the executive department announced plans to reduce the number of United States troops committed to Indochina hostilities. However, the United States continues to commit substantial elements of its armed forces to the Indochina war. By the close of 1970, over 44,000 United States military personnel had died in the Indochina war, and over 300,000 had been wounded.

k. No declaration of war against any foreign state has been passed by the Congress, nor has Congress in any other manner

ratified the United States' prolonged involvement in the Indochina war.

l. The Order referred to in paragraph 6 herein, and attached hereto as Exhibit A, was issued by defendant and by persons acting under his control and direction. Defendant and persons acting under his control and direction have no lawful or constitutional power or authority to order plaintiff to participate in this war, and said Order is unlawful.

m. Defendant and persons acting under his control and direction have ordered many thousands of other persons to assignment to Vietnam, and other foreign countries in Indochina, which orders are also unlawful, since no lawful or constitutional power or authority exists for the issuance thereof.

8. As a direct and proximate result of said unlawful orders, plaintiff, and many thousands of other persons, will be compelled to participate in an undeclared war in a foreign country. Such participation will subject plaintiff, and many thousands of other persons, to substantial danger of death or grievous bodily injury; to the extreme mental stress of combat; and to the various and manifold dangers of war, including, without limitation, the danger of being introduced to the use of marijuana, and heroin and other drugs, and other immoral and unsafe practices, all without his consent.

9. As a result of all of the matters alleged herein, the actions of defendant threaten to deprive plaintiff, and many thousands of other persons, of his liberty and property, and perhaps his life, without due process of law in violation of the Constitution of the United States, and will subject plaintiff to involuntary servitude prohibited by the U.S. Const., Amend. XIII.

10. Unless restrained and enjoined, defendant Melvin R. Laird, his agents and employees, and persons and parties un-

der his control and direction, or acting in concert or participation with said defendant, will require plaintiff, and many thousands of other persons, against his will: to obey said Order attached hereto as Exhibit A or similar orders; to travel to Vietnam or some other foreign country in Indochina; to participate in military activities in Vietnam or some other foreign country in Indochina; and to engage in a war in Vietnam or some other foreign country in Indochina, although Congress has declared no war, and although said defendant and said agents, employees, and persons are without any lawful or constitutional power or authority to do so.

11. Unless restrained and enjoined, defendant Melvin R. Laird, his agents and employees, and persons and parties under his control and direction, or acting in concert or participation with said defendant, will deprive plaintiff of his liberty and property, and perhaps his life, without due process of law, in violation of the Constitution of the United States; and will subject plaintiff to involuntary servitude in violation of U.S. Const., Amend. XIII.

12. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment as follows:

I. That this Court enter a Preliminary and then a Permanent Injunction restraining and enjoining defendant Melvin R. Laird, his agents and employees, persons and parties under his control and direction, and any and all persons or parties acting in concert or participation with him from doing any of the following acts:

A. Requiring in any way, directly or indirectly, that plaintiff obey said Order attached hereto as Exhibit A; and

B. Requiring in any way, directly or indirectly, that plaintiff travel to Vietnam, or any other foreign country in Indochina; and

C. Requiring plaintiff to engage in military or war activities in Vietnam or any other foreign country in Indochina;

II. That this Court declare said Order to plaintiff attached to the Complaint as Exhibit A to be illegal, void, and of no force or effect; and

III. That this Court declare that any and all Orders issued by defendant Melvin R. Laird, his agents and employees, persons and parties under his control and direction, and any and all persons or parties acting in concert or participation with said defendant, which Orders require any person not a volunteer to travel to Vietnam or some other foreign country in Indochina to participate in military or war activities therein, are illegal, void, and of no force or effect.

IV. Grant such other and further relief as is just and equitable.

Dated: May 26, 1971.

STATE OF MINNESOTA
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By JOHN M. MASON
Solicitor General
and PHILIP W. GETTS
Special Assistant
Attorney General
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State of Minnesota
County of Ramsey—ss.

Clifton Dean Perkins, being duly sworn, deposes and says that he resides at 1000 Cityview Drive, Minnetonka, Minnesota; that he is the plaintiff herein, and that he has read the foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

CLIFTON DEAN PERKINS

Subscribed and sworn to before me this 26th day of May, 1971. — Geraldine R. LaNasa, Notary Public, Ramsey County, Minn. My commission expires Jan. 24, 1978.

EXHIBIT A

DEPARTMENT OF THE ARMY
Headquarters, Fort George G. Meade
Fort George G. Meade, Maryland 20755

SPECIAL ORDERS 1 April 1971
NUMBER 69
EXTRACT

76. TC 202. Following reassignment directed. Individual will proceed on PERMANENT CHANGE OF STATION as indicated.

PERKINS, CLIFTON D. 473-58-5808 SP4 82C20 D Co, 1st Sqdn 6th Armd Cav (WG2UDO) FGGM MD 20755

ADMINISTRATIVE ACCOUNTING DATA
Auth: SEPOS 031-P-26
Aloc: Jun 71
OPO C&L No. VDX 6660

Lv adrs: 1000 Cityview Dr., Minnetonka, Minnesota 55343
Moos (curr tour): NA
PCS MDC: 4AE1
PCCN: To be furnished
CIC: 211A.03
Ultimate asg: USARV TRANS DET (WOBRAA) APO SF 96384
FOR THE INDIVIDUAL
Assigned to: United States Army Overseas Replacement Station (WODLAA) Oakland Army Base, Oakland, California 94626 In country designator code - 4W
Reporting date: 5 June 1971
Leave data: 21 days leave
Availability date: 5 June 1971
Port call data: Report to the United States Army Overseas Replacement Station (WODLAA) Oakland Army Base, Oakland, California 94626 on 5 June 1971 not later than 1200 hours.
Special Instructions: (a) Comply with the following numbered items of Department of the Army Supplemental Instructions (Appendix B Army Regulation 310-10): 14, 27, 28, 36, 40, 48, 58, 59, 62.

(b) Will proceed date: 10 May 1971

(c) Personal mail will be sent to Personal Mail Section, Army Post Office, San Francisco 93681.

* * *

EXHIBIT A-1

Para 76 SO 69 this Headquarters dated 1 April 1971 (Cont)

* * *

FOR THE COMMANDER:

ELAM W. WRIGHT JR.
COL, INF
Chief of Staff

OFFICIAL:

.....

DONALD R. KENNEDY
LTC, AGC
Adjutant

DISTRIBUTION: [Omitted]

INTERROGATORIES TO DEFENDANT
[Caption Omitted]

To: Defendant Melvin R. Laird, and to Robert A. Renner, United States District Attorney for the District of Minnesota, United States Courthouse, Minneapolis, Minnesota, his attorney.

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, plaintiff demands answers, under oath, to the following Interrogatories within thirty (30) days.

1. If you claim in any way that the United States Congress has ratified the war or any of the actions of the President in Indochina, identify with particularity each and every Congressional act, law or resolution which you claim constitutes such ratification, including, without limiting the generality of the foregoing, dates on which you claim each such event took place.

2. If you claim in any way that a Congressional declaration of war by Congress regarding the Indochina war would invoke treaty or other obligations not now invoked, identify with particularity each such claimed treaty or other obligation, and summarize the nature of each said obligations which you claim would be invoked.

3. If you claim in any way that a Congressional declaration of war would forestall, hinder, or slow down any withdrawal of U. S. military personnel from Indochina, state with particularity the facts upon which you base said claim.

4. If you claim in any way that a judicial proscription against sending unwilling United States citizens to Indochina, absent a Congressional declaration of war, would forestall, hinder, or slow down any withdrawal of U. S. military personnel from Indochina, state with particularity the facts upon which you base said claim.

5. If you claim in any way that a judicial proscription against sending unwilling United States citizens to Indochina, absent a Congressional declaration of war, would render ineffective or hamper the conduct of foreign policy by the President or the Department of State, state the facts upon which you base said claim.

6. If you claim that at some future date no citizen will be sent involuntarily to Indochina, state said date.

7. As to each of the following dates, state: a) the combined total number of U. S. military personnel residing or stationed in Vietnam; and b) the total number of conscripted or drafted U. S. military personnel residing or stationed in Vietnam, expressed as an absolute number, and as a percentage of the

total number of U. S. military personnel in Vietnam on each said date:

(1) January 1, 1949
(2) January 1, 1950
(3) January 1, 1951
(4) January 1, 1954
(5) January 1, 1959
(6) January 1, 1960
(7) January 1, 1961
(8) January 1, 1963
(9) January 1, 1964
(10) January 1, 1965
(11) January 1, 1966
(12) January 1, 1967
(13) January 1, 1968
(14) January 1, 1969
(15) January 1, 1970
(16) May 28, 1970
(17) April 1, 1971
(18) June 1, 1971

If you do not have statistics available for the precise dates requested in the Interrogatory, then answer said Interrogatory with such data as is available near said dates.

Dated: June 28, 1971.

STATE OF MINNESOTA
WARREN SPANNAUS
Attorney General
By JOHN M. MASON
Solicitor General
and PHILIP W. GETTS
Special Assistant
Attorney General
Attorneys for Plaintiff
160 State Office Building
St. Paul, Minnesota 55101
(612) 221-2961

MOTION TO DISMISS

[Caption Omitted]

Now comes the defendant in the above-entitled action and moves this Honorable Court to dismiss the aforesaid action asserting therefore the following grounds:

1. Failure to state a claim upon which relief can be granted in that the complaint presents questions which lack justiciability and which are not susceptible to judicial determination.
2. Plaintiff lacks the requisite standing to sue.
3. The Court lacks subject matter jurisdiction.

Dated: July 2, 1971.

ROBERT G. RENNER
United States Attorney

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SUPREME COURT, U.S.

No. 71-790

FILED
FEB 4 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

CLIFTON DEAN PERKINS, PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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CLIFTON DEAN PERKINS, PETITIONER

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, who was drafted into the Army, brought this suit for declaratory and injunctive relief, alleging that the government's involvement in the hostilities in Vietnam is unconstitutional. The district court dismissed the complaint (Pet. App. A-2) and the court of appeals summarily affirmed (Pet. App. A-1). The decision of the court of appeals is plainly correct and does not merit review by this Court.

1. Petitioner asks this Court to declare unconstitutional the United States' participation in combat in Southeast Asia because, he argues, it has not been properly authorized by Congress. The issue raised here

was before this Court recently on the motion by the Commonwealth of Massachusetts for leave to file a complaint in *Massachusetts* v. *Laird*, No. 42 Original, October Term 1970, motion denied, 400 U.S. 886. For the reasons stated in our brief in opposition in that case (No. 42 Original, at pp. 17-42), we submit that the issue is not susceptible of judicial determination or effective judicial relief and presents a nonjusticiable political question. See *Baker* v. *Carr*, 369 U.S. 186; *Powell* v. *McCormack*, 395 U.S. 486; *Georgia* v. *Stanton*, 6 Wall. 50; *Luther* v. *Borden*, 7 How. 1. This Court recently declined to review on certiorari a case presenting the same issues. See *Orlando* v. *Laird*, 443 F. 2d 1039 (C.A. 2), certiorari denied October 12, 1971, No. 71-97.

2. There is no conflict among the circuits concerning challenges to the constitutionality of the United States military operations in Southeast Asia. The lower courts have regularly dismissed actions based on the identical contention made here on grounds that the issue raised is a non-justiciable political question,[1] or that the suit was an unconsented suit against the United States,[2] or that

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[1] See, *e.g.*, *Orlando* v. *Laird*, 443 F. 2d 1039 (C.A. 2), certiorari denied October 12, 1971, No. 71-97; *Massachusetts* v. *Laird*, 4 S.S.L.R. 3604 (C.A. 1); *Da Costa* v. *Laird*, 4 S.S.L.R. 3565 (C.A. 2), petition for certiorari pending, No. 71-833; *Luftig* v. *McNamara*, 252 F. Supp. 819 (D. D.C.), affirmed, 373 F. 2d 664 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A. D.C.), certiorari denied, 389 U.S. 934; *Velvel* v. *Johnson*, 287 F. Supp. 846 (D. Kan.), affirmed, *sub nom. Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042; *Davi* v. *Laird*, 318 F. Supp. 478 (W.D. Va.); cf. *United States* v. *Holmes*, 387 F. 2d 781 (C.A. 7), certiorari denied, 391 U.S. 936.

[2] See, *e.g.*, *Luftig* v. *McNamara*, *supra*, n. 1; *Velvel* v. *Johnson*, *supra*, n. 1.

the plaintiff was without standing to bring the suit.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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[3] See, *e.g.*, *Ashton* v. *United States*, 404 F. 2d 95 (C.A. 8), certiorari denied, 394 U.S. 960; *Kalish* v. *United States*, 411 F. 2d 606 (C.A. 9), certiorari denied, 396 U.S. 835; *Velvel* v. *Johnson*, *supra*, n. 1; and see *United States* v. *Bolton*, 192 F. 2d 805 (C.A. 2) (Korean War).

☆ U.S. Government Printing Office: 1972—455-748/451